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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 ROBERTO GARCIA-OLVERA,

15 Defendant.

CASE NO. 11CR1197 WQH

ORDER

16 HAYES, Judge:

17 The matter before the Court is the Motion to Dismiss the Indictment under 8 U.S.C. §
18 1326(d) filed by the Defendant Roberto Garcia-Olvera. ECF No. 11.

19 **FACTS**

20 On December 1, 1990, Defendant became a lawful permanent resident of the United
21 States.

22 On September 16, 1996, Defendant entered a plea of guilty to the following two
23 charges: 1) Count 1 Unlawful Intercourse with a Minor in violation of Cal. Penal Code §
24 261.5(d) and 2) Count 2 Lewd Act Upon a Child 14 or 15 years of age in violation of Cal.
25 Penal Code § 288c. The Plea of Guilty document and the Judgment included both charges.
26 ECF No. 11-2 at 43. The Plea of Guilty document stated “ I now plead guilty to the charges
27 [Count 1- PC 3 261.5(d) and Count 2 - PC 3 288(c)] and admit that on the date charged I ... had
28 sexual intercourse with a minor under the age of 16 years; and I committed a lewd act on a 15

1 year old and I was more than 10 years older than she.”ECF No. 11-2 at 50.

2 On January 17, 1997, the Immigration and Naturalization Service initiated deportation
3 proceedings against the Defendant. The Order to Show Cause alleged that “you were on
4 September 16, 1996, convicted ... of the offense of LEWD ACT UPON A CHILD OF 14 or
5 15 YEARS OF AGE, committed between January 01, 1995 and April 30, 1996, in violation
6 of Section 288(c) of the California Health and Safety Code.” ECF No. 11-2 at 37.

7 On April 23, 1997, the Immigration Judge conducted a hearing. Defendant was
8 represented by counsel. The Immigration Judge concluded that the “allegations set forth in the
9 Order to Show Cause” were proven by clear and convincing evidence and constituted an
10 aggravated felony under the law. ECF No. 11-2 at 22. The Immigration Judge further
11 concluded that the Defendant was statutorily ineligible for Section 212(c) relief based upon
12 this conviction. Defendant was ordered deported. Defendant appealed the order of deportation
13 to the Board of Immigration Appeals. On May 26, 1998, the Board upheld the decision of the
14 Immigration Judge. Defendant was removed in 2000.

15 On November 14, 2010, Defendant was arrested by the San Diego Police Department
16 for failing to register as a sex offender.

17 On February 11, 2001, Defendant was transferred to immigration custody.

18 On March 29, 2011, the grand jury returned an indictment charging the Defendant with
19 Deported Alien found in the United States in violation of 8 U.S.C. § 1326 (a) and (b).

20 **CONTENTIONS OF THE PARTIES**

21 Defendant asserts that the indictment must be dismissed on the grounds that he was not
22 removable as charged. Defendant asserts that the offense of Lewd Act Upon a Child 14 or 15
23 years of age in violation of Cal. Penal Code § 288c was not an aggravated felony under the
24 categorical or the modified categorical approach, and that he was eligible for relief, including
25 relief under 212(c) of the Immigration and Naturalization Act. Defendant contends that his
26 deportation was fundamentally unfair and cannot serve as a predicate act under 8 U.S.C. §
27 1326.

1 The Government asserts that the Defendant's conviction Lewd Act Upon a Child 14 or
 2 15 years of age in violation of Cal. Penal Code § 288(c) was an aggravated felony at the time
 3 of the immigration hearing, that the Court may find the Section 228(c) charge was an
 4 aggravated felony under the modified categorical approach, and that the Court can find that
 5 the Defendant suffered no prejudice even if the § 228(c) charge was not an aggravated felony.

6 APPLICABLE LAW

7 A defendant charged with a violation of Section 1326 may collaterally attack the prior
 8 deportation prior to trial under the due process clause. *United States v. Pallares-Galan*, 359
 9 F.3d 1088, 1095 (9th Cir. 2004). In order to sustain a collateral attack under §1326(d), a
 10 defendant must, within constitutional limitations, demonstrate: (1) that he exhausted all
 11 administrative remedies available to him to appeal his removal order, (2) that the underlying
 12 removal proceedings at which the order was issued improperly deprived him of the opportunity
 13 for judicial review, and (3) that the entry of the order was fundamentally unfair. 8 U.S.C. §
 14 1326(d). An underlying removal order is fundamentally unfair if: 1) an alien's due process
 15 rights were violated by defects in the underlying proceedings, and 2) he suffered prejudice as
 16 a result of the defects. *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004).

17 ANALYSIS

18 The issue presented in this case is whether the Defendant's 1996 conviction for Lewd
 19 Act Upon a Child 14 or 15 years of age in violation of Cal. Penal Code § 288(c) was "sexual
 20 abuse of a minor" and qualified as an aggravated felony under 8 U.S.C. §1101(a)(43)(A).¹

21 The Court first applies the categorical approach set forth in *Taylor v. United States*, 495
 22 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). In this case, the Court of Appeals
 23 concluded that Section 288(c) "does not address conduct that is per se abusive." *United States*
 24 *v. Castro*, 607 F.3d 566, 569 (9th Cir. 2010). Section 288(c)(1) is "categorically broader than
 25 the generic offense [of sexual abuse of a minor] because it is missing one element of the

26 ¹8 U.S.C. § 1101(a)(43) states: "[t]he term 'aggravated felony' means – (A) murder,
 27 rape, or sexual abuse of a minor."

1 generic crime, a ‘sexual act.’” 607 F.3d at 569. In *Castro*, the Court of Appeals explained that
2 “‘sexual act’ requires, at a minimum, an intentional touching, not through the clothing, of a
3 minor’s genitalia. Section 288(c)(1), however, contains no such requirement; it required only
4 a ‘lewd or lascivious’ act. Lewd touching, for purposes of section 288, can occur through a
5 victim’s clothing and can involve any part of the victim’s body.” *Id.* at 570.

6 The Court may consider the modified categorical approach. *Id.* “The purpose of the
7 modified categorical approach is ‘to determine if the record unequivocally establishes that the
8 [Petitioner] was convicted of the generically defined crime, even if the statute defining the
9 crime is overly inclusive.’” *Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1083 (9th Cir. 2010)
10 (quoting *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc)).
11 Under the modified categorical approach, the Court “may look beyond the language of the
12 statute to a narrow, specified set of documents that are part of the record of conviction,
13 including ‘the indictment, the judgment of conviction, jury instructions, a signed guilty plea,
14 or the transcript from the plea proceedings.’” *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir.
15 2004) (quoting *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001) (en banc)).

16 In this case, Defendant stated as a factual basis for the plea that “I committed a lewd act
17 on a 15 year old and I was more than 10 years older than she.” ECF No. 11-2 at 50. There was
18 no factual admission to a “sexual act.” *Castro* requires admission to a sexual act in order for
19 the offense to constitute “sexual abuse of a minor” under §1101(a)(43)(A). The Court
20 concludes that the record does not unequivocally establish that the 1996 conviction for Lewd
21 Act Upon a Child 14 or 15 years of age in violation of Cal. Penal Code § 288(c) was “sexual
22 abuse of a minor” and qualified as an aggravated felony under 8 U.S.C. §1101(a)(43)(A).

23 The Government further asserts that Defendant cannot show prejudice required to
24 conclude that the underlying order of removal was fundamentally unfair because the
25 Defendant’s conviction on September 16, 1996 included a separate charge in Count 1 of
26 Unlawful Intercourse with a Minor in violation of Cal. Penal Code § 261.5(d). The
27 Government asserts that the Count 1 charge qualifies as “sexual abuse of a minor” under
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1 §1101(a)(43)(A) using the modified categorical approach. Defendant contends that he suffered
2 prejudice when the Immigration Judge concluded that he was statutorily ineligible for relief
3 under Section 212(c) because his conviction under Section 288(c) was an aggravated felony.
4 Defendant contends that there was only one charge in the Order to Show Cause and that he was
5 not removable as charged.

6 In this case, the Section 261.5(d) conviction was not alleged in the Order to Show Cause
7 and not found by the Immigration Judge. The Court of Appeals addressed this same fact
8 situation in *United States v. Camacho-Lopez*, 450 F.3d 928 (9th Cir. 2006). The Court of
9 Appeals stated:

10 ...[to] succeed in his attack, Camacho must demonstrate that he was prejudiced
11 and that, therefore, the removal order was fundamentally unfair. *See* 8 U.S.C. §
12 1326(d)(3). Camacho's Notice to Appear charged him as removable *only* for
13 having committed an aggravated felony; as discussed above, Camacho's prior
conviction did not fit that definition. Thus, Camacho was removed when he
should not have been and clearly suffered prejudice. We, therefore, reverse and
remand with instructions to dismiss the indictment.

14 450 F.3d at 930. In Footnote 1, the Court of Appeals distinguished cases in which more than
15 one conviction was alleged in the Notice to Appear. The Court stated:


16 In this respect, Camacho's case differs from *Pallares-Galan*. *Pallares-Galan* had
17 additional convictions alleged in the original Notice to Appear, which also could
18 have supported his removability and led us to remand to the district court to
consider the issue of prejudice. *United States v. Pallares-Galan*, 359 F.3d at
1092, 1103-04.

19 *Id.* at FN 1.

20 In this case, the Order to Show Cause alleged Defendant was removable based only on
21 the conviction under Section 288(c). The Immigration Judge concluded that the Defendant
22 was statutorily ineligible for relief under Section 212(c) based upon the only conviction
23 alleged. The Court has concluded that this conviction did not fit the definition of aggravated
24 felony and did not support the conclusion of the Immigration Judge. Defendant has shown
25 prejudice.

1 IT IS HEREBY ORDERED that Motion to Dismiss the Indictment under 8 U.S.C. §
2 1326(d) filed by the Defendant Roberto Garcia-Olvera ECF No. 11 is granted.

3 DATED: May 26, 2011

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5 **WILLIAM Q. HAYES**
6 United States District Judge
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